

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ROBERT J. NAGY,)
YURI DEBEVC,) 2:08-CV-2555
)
Plaintiffs) Charleston,
) South Carolina
VS) June 18, 2010
)
UNITED STATES OF AMERICA,)
)
Defendant)

TRANSCRIPT OF PRETRIAL HEARING
BEFORE THE HONORABLE DAVID C. NORTON,
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Defendant: MR. NATHAN CLUKEY
MR. GREGORY SEADOR
MS. ELLEN WEIS
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For the Plaintiff: MR. LINDSEY W. COOPER, JR., ESQ.
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MR. YURI DEBEVC
Appearing pro se

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Proceedings recorded by mechanical shorthand,
Transcript produced by computer-aided transcription.

1 THE COURT: Okay. I'm ready when y'all are.

2 MR. CLUKEY: Your Honor, we've -- we exchanged a
3 number of exhibits with opposing counsel, and Mr. Debevc had
4 done the same.

5 I believe Mr. Debevc had had something he wanted to
6 raise before we got started with this.

7 THE COURT: Okay.

8 MR. DEBEVC: Your Honor, good afternoon.

9 THE COURT: Hi.

10 MR. DEBEVC: Um, I don't know how this Court is
11 aware, but I have been trying to settle this matter with the
12 United States. Previously, their offer was rejected, and I'm
13 at a point right now that the -- one moment please.

14 THE COURT: Sure.

15 (Pause in proceedings.)

16 MR. DEBEVC: That I would still be willing to settle
17 with the Department of Justice Tax Division for a consent
18 judgment in -- providing to a number, that a consent judgment
19 would be without a finding of any wrongdoing or admission of
20 any wrongdoing on my part.

21 And I raise that the -- it is my understanding that
22 there is some flexibility on the part of the personnel in the
23 Department of Justice on that number. The current number is
24 \$3,353,633, and apparently there is some flexibility of half
25 a million dollars less than that.

1 So I would be looking for a -- for a judgment,
2 provided that we can reach the language without finding of
3 any wrongdoing or admitting any wrongdoing on the part of
4 Debevc.

5 THE COURT: Okay.

6 MR. CLUKEY: Your Honor, I was speaking in general
7 terms. I was talking to Mr. Debevc as far as flexibility,
8 what we do in settlements, kind of explaining the process and
9 procedure.

10 I think, what it sounded to me, and I wanted Mr.
11 Debevc to raise it with you, because I didn't want to give
12 him legal advice, but it sounded that what he wanted to do
13 was something to the effect of default judgment, or some kind
14 of consent judgment, and then I wasn't sure if he was
15 offering to settle or exactly what was happening, so --

16 THE COURT: Well, let me see, my understanding of
17 what Mr. Debevc just said is he would be amenable to entering
18 into a consent judgment with the -- in this case with the
19 Justice Department for an amount of money, which, somewhere
20 between 3.3 and \$2.8 million, as long as the consent judgment
21 does not find any --

22 MR. DEBEVC: Wrongdoing.

23 THE COURT: -- wrongdoing on his part.

24 MR. DEBEVC: My part admitting any wrongdoing.

25 THE COURT: Or admitting any wrongdoing.

1 MR. DEBEVC: On my part.

2 THE COURT: I hear that kind of stuff going on all
3 the time in Washington. I've never it done it down here. Is
4 that --

5 MR. CLUKEY: We'll consider it, Your Honor. He just
6 raised it before you came down, and I'll talk to the front
7 office and ask them.

8 THE COURT: I note, not to be pejorative, sometimes
9 it takes a while to get an answer in the Justice Department.

10 MR. CLUKEY: You are right. That's dead on.

11 THE COURT: Can one of the three of y'all call
12 somebody in Washington before they take the week off and see
13 if that's a possibility? I mean, there is a lot of work -- I
14 mean, a lot of things to be done.

15 MR. CLUKEY: We will, Your Honor.

16 THE COURT: Okay.

17 MR. CLUKEY: We'll call today.

18 THE COURT: Since there is three of you here and
19 only one of you can speak at a time, it may be a good use of
20 resources for one of y'all to get on the phone and see if you
21 can work something like that out while the rest of us are in
22 here hashing out documents.

23 MR. CLUKEY: That's fine, Your Honor. I'm lead
24 counsel in this case and I'm really the one who should make
25 the call.

1 THE COURT: Okay.

2 MR. CLUKEY: At the same time I have a very vested
3 interest in discussing some of these exhibits.

4 THE COURT: Okay.

5 MR. CLUKEY: I think I can leave, at least the
6 initial part, I think I could leave it in the hands --

7 THE COURT: Or we can stop for ten minutes, and you
8 know -- I don't know whether you can get through in ten
9 minutes or an answer in ten minutes, but you will certainly
10 know if the person you have to call will or will not be in
11 this afternoon.

12 MR. CLUKEY: Um --

13 THE COURT: Are you familiar with these type of
14 settlements in your --

15 MR. CLUKEY: Yes, Your Honor.

16 THE COURT: Okay.

17 MR. CLUKEY: Yeah. I can make a call right now,
18 Your Honor. Is it okay if we take a 10-minute recess?

19 THE COURT: Yeah. Here are two depositions which
20 have been marked up. So y'all can do some responsive
21 reading.

22 As usual, you win some and you lose some. So here
23 they are right here, and you can take a look at them while
24 I'm gone. So you might win your motion after all.

25 MR. COOPER: It would be the first one.

1 (Thereupon, there was a brief recess.)

2 THE COURT: There is at least one juror who has
3 fallen down the stairs whose doctor says he can't come, and
4 there is another juror who has been diagnosed with Shingles,
5 who may be contagious for 48 to 72 hours. And we'll call
6 back, and if that juror is contagious, she won't come back.

7 So we are going to have 11 right now, okay?

8 Well, Mr. Clukey, make my day.

9 MR. CLUKEY: It's in process, Your Honor.

10 And so I did -- I did reach folks in Washington, and
11 they now have to talk to IRS counsel, but things are in the
12 works right now.

13 THE COURT: So we'll just keep going, and then
14 hopefully -- are they going to call you back?

15 MR. CLUKEY: I'm going to call them back in a little
16 while, and hopefully, they've made some progress.

17 THE COURT: Sounds good to me.

18 So Mr. Debevc, they didn't reject it out of hand.
19 So we'll just have to start, go on two tracks right now,
20 okay?

21 MR. DEBEVC: Understood.

22 THE COURT: And it's my understanding from my court
23 reporter that sometimes that y'all drop your voices and don't
24 speak directly into the microphone. So if everybody would
25 please try to speak in the microphone, because we -- she has

1 to hear before she can put it down, okay?

2 MR. CLUKEY: Yes, Your Honor.

3 THE COURT: Okay. What we got now?

4 MR. CLUKEY: We would like to start, since we are
5 going first, we would like to start with some of the
6 exhibits, if that's okay.

7 THE COURT: All right. Sure.

8 MR. CLUKEY: Actually, Your Honor, we've got a
9 number of exhibits for which there are no objection.

10 THE COURT: Okay.

11 MR. CLUKEY: We would like to move those into
12 evidence.

13 THE COURT: All right. Do you want to just read
14 them out? Are there -- have they already got stickers on
15 them and all that?

16 MR. CLUKEY: Yes, they have, yes, because Mr. Nagy
17 is going to start at 400, and ours are already numbered.

18 THE COURT: So do you want to go ahead and -- yeah?

19 MR. COOPER: I discussed it yesterday. We are going
20 to do plaintiff's 1 through -- we are instructed to do
21 plaintiff's 1 through, I think we have 80 something.

22 THE COURT: Okay.

23 MR. COOPER: And they'll do Government 1 through 300
24 something.

25 MR. CLUKEY: Your Honor, we actually don't have the

1 physical exhibits here, so...

2 THE COURT: All right. And so just go ahead and put
3 those numbers on the record, and Gail will have a copy of
4 them, and she'll mark those into evidence.

5 I guess this is for both sides. You have some on
6 your side, too, Mr. Cooper and Mr. Debevc, that are not
7 objected to?

8 MR. COOPER: Yes, Your Honor.

9 THE COURT: Okay. Just put -- we'll just do those,
10 the Government, you do those, read those into the record.
11 And then Mr. Cooper, you can read yours into the record. And
12 y'all check -- and Mr. Debevc, you can read yours into the
13 record to which there have been no objections, and then Gail
14 will have them, and on Monday we'll know which ones are in
15 evidence. And then if somebody hasn't marked them correctly,
16 or we have marked them incorrectly, then we'll take care of
17 it then.

18 Go ahead.

19 MR. CLUKEY: Exhibit 48, 210, 212, 335, 193, 194,
20 207, 204, 223, 42.

21 (Thereupon, Government's Exhibit Numbers 48, 210,
22 212, 335, 193, 194, 207, 204, 223 and 42 were received in
23 evidence.)

24 THE COURT: Does that comport with everybody else's
25 records?

1 MR. COOPER: Your Honor, Mr. Nagy has no objection
2 to those exhibits.

3 THE COURT: Okay.

4 MR. DEBEVC: Mr. Debevc doesn't have any objections.

5 THE COURT: Okay. Good. Thank you.

6 THE COURT: All right. How about Mr. Nagy's
7 exhibits, of which we need to mark into evidence, perhaps?

8 MR. COOPER: Your Honor, 39, 41, 42, 43, 44, 45, 46,
9 47, 48, 51. That's all, Your Honor.

10 THE COURT: Okay.

11 MR. CLUKEY: Your Honor, those are -- I guess it
12 depends on different local rules on it -- those are all our
13 exhibits; is that correct?

14 MR. COOPER: No, those were Mr. Nagy's exhibits.

15 MR. CLUKEY: I'm sorry. Okay. Sure.

16 No objection, Your Honor.

17 (Thereupon, Plaintiff's Exhibit Numbers 39, 41, 42,
18 43, 44, 45, 46, 47, 48 and 51 were received in evidence.)

19 MS. WEIS: To clarify for the record, I think those
20 will be not 39, but 439 and --

21 MR. CLUKEY: Right.

22 MR. COOPER: No, we just explained that we are going
23 Plaintiff's 1 through 87, and then --

24 THE COURT: So they are going to go Plaintiff's 1
25 through 87, Government 1 through 87, rather than Exhibit 400

1 something. I think we have different colored stickers for
2 each side, too.

3 How about, Mr. Debevc, what you got?

4 MR. DEBEVC: I am actually a little confused, Your
5 Honor, because I think that I have submitted the exhibits
6 that there were objection to exhibits. So I'm a little bit
7 confused in terms -- there are certain exhibits that were not
8 objected to by any party.

9 THE COURT: Okay.

10 MR. DEBEVC: And there are some that are -- that the
11 United States objects to, but I would like to introduce them.

12 THE COURT: So right now, I think if you could read
13 into the record those exhibits which you propose to introduce
14 into evidence to which there have been no objection.

15 MR. DEBEVC: Thank you, Your Honor.

16 THE COURT: Okay.

17 MR. DEBEVC: That would be Exhibit 19.

18 THE COURT: All right.

19 MR. DEBEVC: Exhibit 25. That is -- that is all.

20 THE COURT: Okay.

21 MR. CLUKEY: There is no objection, Your Honor.

22 THE COURT: Okay. So Mr. Debevc's 19 and 25 in
23 evidence. The ones that are read out by Mr. Cooper and Mr.
24 Clukey are both in evidence, too, okay?

25 (Thereupon, Plaintiff Debevc's Exhibit Numbers 19

1 and 25 were received in evidence.)

2 MR. COOPER: Your Honor, and maybe if, to try to
3 speed things along, I don't know if Mr. Debevc raised
4 exhibits, but I withdrew objections to Government Exhibits
5 11, 12, 20, 54, 116, 120, 142, 143, and then I'm going to go
6 out of order, also 38 and 40. Two of them are on the list
7 they sent me yesterday, 38 and 40, which was the last two.
8 The other ones I simply --

9 MR. CLUKEY: Your Honor, we would like to move in 38
10 and 40.

11 THE COURT: Okay. And there have been no objections
12 by Mr. Debevc to 38 and 40.

13 MR. CLUKEY: I'm sorry. There have been?

14 MR. CLUKEY: No objection to 40.

15 THE COURT: Okay. And that's Government Exhibit 38
16 and 49?

17 MR. COOPER: That's correct, Your Honor.

18 THE COURT: And the remaining ones that Mr. Nagy has
19 objected to, did Mr. Debevc also object to those?

20 MR. CLUKEY: In most cases, Your Honor.

21 THE COURT: Okay. They are not always identical
22 objections.

23 (Thereupon, Government Exhibit Numbers 11, 12, 20,
24 54, 116, 120, 142, 143 , 38 and 40 were received in
25 evidence.)

1 THE COURT: Okay.

2 MS. WEIS: Um, Your Honor, how would you prefer for
3 exhibits where there are disputes as to whether or not should
4 come in under a particular objection for your purposes to see
5 the exhibit?

6 THE COURT: I can barely hear you.

7 MS. WEIS: And it's probably me they were talking
8 about.

9 THE COURT: No, it was everybody.

10 MS. WEIS: For the exhibits where there are --

11 THE COURT: Except for Mr. Cooper, Mr. Cooper, we
12 don't need a microphone for him, all right?

13 Yes.

14 MS. WEIS: For exhibits where there are objections,
15 how would you prefer to see -- to look at the exhibit in
16 order to rule on it?

17 THE COURT: I think we'll have to do it the
18 old-fashioned way. When you want to propose to put it in,
19 you give it to the witness, whoever the witness is, you give
20 it to them, I hand you Government's Exhibit No. 51, which is
21 marked for identification, do you recognize this? Yada,
22 yada, yada. Lay a foundation for it. Move it into evidence.
23 And then they can object or withdraw their objection, or I'll
24 hear their objection and rule on it. I don't see any other
25 way to do it.

1 MS. WEIS: Well, for today I guess was my question,
2 the exhibit that we wanted to discuss today that there are
3 objections to, do you want us to give you physical copies?

4 THE COURT: We'll talk about it. And then if I need
5 physical copies, then we'll go from there. How is that?

6 MS. WEIS: Okay.

7 THE COURT: All right. I guess maybe one thing is,
8 I'm sure we will get to it sooner or later, McDermott Will &
9 Emery.

10 So I understand the objection to it. I've looked at
11 it. I've looked at the cover memorandum. I understand that
12 whoever is going to try to -- the plaintiffs are trying to
13 put it in as a -- under the business record rule, and I also
14 understand from, I think an e-mail to Frank last night, that
15 there is nobody who can authenticate this record.

16 MR. COOPER: Actually, I wasn't real happy with the
17 ad lib to the clerk. I worked last night and called a man to
18 pay for the opinion and gave it to Mr. Lancaster, and he's
19 provided a declaration under 901, authenticated the document.
20 He looked at it. He talked about the procedures. He said it
21 was not altered.

22 If I may hand it up, Your Honor?

23 THE COURT: Sure. What, you mean --

24 MR. COOPER: It's the declaration authenticating --

25 MS. WEIS: Your Honor, we haven't seen a copy of

1 that.

2 MR. COOPER: I'll hand it to them right now.

3 MR. COOPER: Mr. Straus is the owner of EMC
4 Corporation. He says he was doing Derivium stock loans at
5 the time the opinion was written. It's unaltered form. He
6 gave it to Mr. Lancaster, who sent the memorandum to Mr.
7 Nagy. Under 901, we think it comes in under many exceptions.

8 901 is, the purpose is to make sure that the
9 document is unaltered.

10 THE COURT: Have you given them a copy of the
11 declaration?

12 MR. COOPER: Yes, Your Honor, we did, to make sure
13 it's unaltered and reliable.

14 We think several reasons it comes in.

15 First of all, Mr. Straus, in his declaration,
16 demanded, paid for it and retained it and gave it to
17 Derivium, attests to that fact. Your indulgence.

18 (Pause in proceedings.)

19 MR. COOPER: Secondly, I believe it's 904(d)(2), the
20 trade -- the trade subscriptions exception to the Rule. It's
21 901(b)(4), where it has a distinctive characteristic to the
22 like.

23 Here, the opinion on the top cover letter has a
24 Derivium letterhead. Mr. Debevc can certify that.

25 Also, you have --

1 THE COURT: I don't think they are talking about the
2 cover letter. All I think they are talking about is the
3 opinion.

4 Isn't that right?

5 MS. WEIS: Yes, Your Honor.

6 MR. CLUKEY: Right.

7 THE COURT: Okay. Cover letter. I mean, that's a
8 no brainer under a business record talking about the
9 enclosure.

10 MR. COOPER: The first part on the business record,
11 my understanding that the Rule of that document was
12 transmitted in the -- under the business.

13 So if it's -- Mr. Nagy can testify that he kept it,
14 didn't alter it in his business records, the entire
15 document --

16 THE COURT: I believe that's a little broad, but
17 that's okay.

18 MS. WEIS: Your Honor, if I could clarify? We still
19 have a 402 and 403 objection to the subject matter. So I
20 just want to make sure.

21 THE COURT: Okay. All right.

22 MR. COOPER: But going to your position, Your Honor,
23 on the underlying --

24 THE COURT: I didn't give a position yet.

25 MR. COOPER: Your question.

1 THE COURT: Okay.

2 MR. COOPER: That the underlying document under
3 901(d)(4), the distinctive characteristics, it's on McDermott
4 Will & Emery letterhead, as well as --

5 THE COURT: Well, it's unsigned.

6 MR. COOPER: But it is on their letterhead,
7 memorandum.

8 THE COURT: I used to be a lot easier on this stuff
9 until Photoshop and all kinds of stuff. I mean, there is
10 some strange stuff that people try to get in that comes out
11 of nowhere. I'm not saying this is one of them. So we can
12 change the Rules to reflect all that, too.

13 MR. COOPER: Also under 902(7), the
14 self-authentication, again with the letterhead.

15 But on top of it, to add to the significance of the
16 self-authentication, the very man that paid for it, withheld
17 it and gave it to Derivium, is attesting to it's a true and
18 correct copy.

19 And we believe we've laid a correct foundation
20 requirement, and there is no -- that there -- there is no
21 risk of that document having been altered.

22 THE COURT: Okay. All right. Well, since we didn't
23 have this and it's brand new, we'll talk about this Monday
24 morning. I mean, I've got to give the Government a chance to
25 take a look at the declaration. I've got to get a chance to

1 research authentication. Because as of last night, this one
2 you couldn't authenticate. If you can't authenticate it,
3 that makes my job pretty easy.

4 So now you've made my job harder, so I get to earn
5 my money this weekend.

6 MR. CLUKEY: Thank you for giving us time to address
7 that.

8 One thing we would like to mention just beforehand,
9 this declaration states, which we just obviously just got a
10 couple of minutes ago, that the stock loan was similar to
11 Derivium's. That's testimony regarding the comparison of two
12 different types of stock loans.

13 And this person was not named as a witness. We
14 didn't have the opportunity to cross-examine him. This is
15 factual testimony that to exclude that portion, which then we
16 think the entire authentication is going to fall apart from
17 that.

18 MS. WEIS: In addition, we don't know what aspects
19 of the program were similar and not similar, which certainly
20 goes to, you know, whether or not McDermott Will & Emery's
21 opinion is reliable in any respect as to the applicability of
22 the 90% Stock Loan Transaction.

23 MR. CLUKEY: Did this other program and hedges, did
24 they tell the people it wasn't tax free? There is just a
25 host of things that we don't know about that would require

1 factual testimony.

2 THE COURT: Okay. All right. We'll take care of
3 this argument and this document at 9:00 Monday morning.

4 MR. CLUKEY: Thank you, Your Honor.

5 MS. WEIS: Your Honor, I want to speak up.

6 The first exhibit that, the Government exhibit that
7 we wish to address objections to, and I'll just go in order
8 of the numbers, is Exhibit 23. It's a letter from Yuri
9 Debevc to Kevin Haase dated March 18, 2005.

10 And both Mr. Cooper and Mr. Debevc have made 402 and
11 403 objections. And I don't know if they want to address
12 those first, or how you want us to address the issue.

13 THE COURT: Well, I think if we are going -- I'm
14 going to have to see this one. I mean -- yeah?

15 MR. COOPER: Your Honor, I thought the purpose of
16 today was to talk about objections to exhibits used for our
17 opening statement. I didn't know we were going to do all the
18 objections for all the exhibits today.

19 THE COURT: Well --

20 MR. COOPER: I mean --

21 THE COURT: We probably aren't, because we don't
22 have enough time. I've got to do them sooner or later, and
23 I've got all afternoon.

24 MR. CLUKEY: These are exhibits we provided to Mr.
25 Cooper last night in an e-mail. We listed all these

1 exhibits. So we gave him notice. We got some from Mr.
2 Cooper this morning and Mr. Debevc this morning, as well. So
3 we certainly teed these up, and it's 25 or so exhibits; not
4 350.

5 THE COURT: You've got them, what, I think Mr.
6 Cooper left all his here last night.

7 MR. SEADOR: If we could get the screen down, we
8 could put them up on --

9 THE COURT: I mean, yeah. Okay. I guess Gail knows
10 how to do that. I don't.

11 THE CLERK: I got it down.

12 THE COURT: I've got people who do, all right?
13 There we go.

14 MS. WEIS: It's a letter from Yuri Debevc to Jane
15 Montgomery Scott, in which he's confirming that the following
16 employees have authority to act, transfer funds and engage in
17 other's actions on behalf of Optech's account.

18 THE COURT: Okay. Since there is -- since there is
19 a 402 and a 403 challenge, what does this letter make more or
20 less likely in this litigation between the Government and Mr.
21 Nagy and Mr. Debevc?

22 MS. WEIS: It goes to whether or not Mr. Nagy -- I'm
23 sorry -- Mr. Debevc. Mr. Nagy also viewed the books and had
24 contact with these individuals.

25 Each of those individuals knew or had reason to know

1 that Optech was a legitimate company, and because it
2 demonstrates the extent to which bringing Mr. Debevc and the
3 people in the United States, as opposed to the people in the
4 office in Hong Kong who were actually operating the so-called
5 lender.

6 THE COURT: I can see how it might be relevant to
7 Mr. Debevc, his involvement in this, but how does -- how is
8 it relevant to Mr. Nagy? I mean, Mr. Nagy is not on it.

9 Did you ask him about it in his deposition?

10 MS. WEIS: No, Your Honor. This wasn't raised in
11 Mr. Nagy's deposition.

12 However, because Mr. Nagy was involved in reviewing,
13 for instance, transfers between some of the letters, and in
14 addition, because Mr. Nagy had personal contact with all of
15 these individuals, and we believe Patrick Kelly can discuss
16 this letter, he also had personal contact with Mr. Nagy.

17 That certainly the fact that these individuals had
18 business already and were engaging in transfers for Optech
19 and otherwise operating, providing operations services for
20 Optech, makes it more -- makes it more likely that Mr. Nagy
21 was aware that these services were being provided to Optech,
22 as well, which goes to the relevance of whether or not Optech
23 was a bona fide lender in the view -- in the eyes of Mr.
24 Debevc and Mr. Nagy.

25 THE COURT: Yes, sir?

1 MR. COOPER: Your Honor, I don't understand that at
2 all.

3 I mean, this is someone authorizing people to do
4 money. Mr. Nagy is not a part of this. He wasn't an owner
5 of Veridia. He wasn't a manager of Veridia. He didn't have
6 signature account. Same thing with Derivium. I don't
7 know -- again, if you want, our exhibits are right next to
8 the court reporter, 91. If you looked at the Statute, it has
9 to go to tax advice, and I don't know how this is relevant at
10 all to his tax advice.

11 THE COURT: Okay. All right. So Mr. Kelly is the
12 one that's going to testify as to this?

13 MS. WEIS: Yes, Your Honor.

14 THE COURT: So we'll do it the old-fashioned way.
15 You ask him about it and we'll mark it for identification,
16 and then there may be an objection, there may not be an
17 objection, and I'll tee it up at the time.

18 MS. WEIS: Very well, Your Honor.

19 Then I imagine -- we'll come to the same situation
20 with exhibit -- Government Exhibit 25, which is the next on
21 our list. And this is the first page. I can read that.
22 There is three pages to this exhibit.

23 THE COURT: Okay. I think we'll have to do that at
24 the same time, okay?

25 MS. WEIS: The next exhibit is Government

1 Exhibit 45.

2 THE COURT: That makes a little more --

3 MS. WEIS: I'm sorry, Your Honor, Government
4 Exhibit 45, there is no objections to by either Mr. Nagy or
5 Mr. Debevc.

6 THE COURT: Oh, good.

7 MS. WEIS: I don't believe that was moved into
8 evidence previously, but we would like to move it into
9 evidence.

10 THE COURT: Is there any objection to 45, which is
11 on Mr. Nagy's letterhead?

12 MR. COOPER: No, Your Honor.

13 THE COURT: Okay. How about you, Mr. Debevc?

14 MR. DEBEVC: I don't believe -- one moment, I have
15 to double-check.

16 THE COURT: Let's see here. You've got no objection
17 to that.

18 MR. DEBEVC: No objection to that letter.

19 THE COURT: 45 in evidence without objection.

20 (Thereupon, Government Exhibit Number 45 was
21 received in evidence.)

22 MS. WEIS: Your Honor, the next exhibit is
23 Government Exhibit 67. And because this is a rough copy, I'm
24 going to flip down, we have two copies of it, one of which is
25 a little bit cleaner version.

1 THE COURT: Okay.

2 MS. WEIS: So it's an e-mail with an attachment.

3 THE COURT: So it's an e-mail from Charles
4 Cathcart -- well, of Derivium Capital to Tim Scrantom, and a
5 carbon copy to Mr. Debevc dated 4-20-01.

6 MS. WEIS: Correct.

7 And we've had deposition testimony verifying from a
8 number of individuals that the attachment, although it has a
9 May 22, 2007 date on it, it should have been in April of
10 2001, as we see on the following pages, the automatic
11 updating feature.

12 So this is a letter by a law firm, Shartsis Friese,
13 that was obtained by Derivium to provide legal advice in
14 connection with the Department of Corporations challenging
15 tax -- Your Honor, I'm sorry. Mr. Clukey has informed me
16 that Mr. Debevc's Exhibit 19 was just admitted, and that that
17 is the same document as the exhibit, Exhibit 67.

18 THE COURT: Okay. So --

19 MS. WEIS: We would like to move for an entry of
20 Government Exhibit 67, as well, given that Mr. Debevc's
21 Exhibit 19 is the identical document that has been admitted
22 into evidence.

23 THE COURT: Okay. Any problem with that?

24 MR. COOPER: A little bit. I'm sorry, it would have
25 been an oversight by me, and especially if he's out of the

1 case. This is a securities lawyer opinion. Mr. Nagy never
2 got it. I believe he testified that he never received this
3 document.

4 We do object on 802 and 803, and there is a hearsay
5 objection, too. And I apologize for the oversight.

6 THE COURT: Yes, sir?

7 MR. CLUKEY: I'll start with a copy of the identical
8 document has been admitted. So I think we've already crossed
9 that bridge, the time to make objections to that document is
10 passed, as an initial matter.

11 Secondly, this is a document that was received by
12 Derivium Capital, which is Mr. Nagy's client, and it concerns
13 the legality of the 90% Loan Program from a securities loss
14 standpoint.

15 Not only that, but also specifically instructs
16 Derivium Capital to go out and get a McDermott -- to go get a
17 legal opinion from a law firm. And it is directly relevant
18 to both whether they are in compliance with the law, whether
19 the people at Derivium Capital knew or had reason to know
20 whether they were in compliance with the law, because there
21 is a law firm telling them that they are not. And it also
22 goes to their scienter as to whether they need to have a
23 legal opinion from a law firm on the tax issues in this case.

24 So they are told in 2001 that they have to go and do
25 this.

1 THE COURT: Okay. And I understand that.

2 MR. CLUKEY: And as far as 801, it would be --

3 THE COURT: Let's -- you've got to connect this
4 somehow to Mr. Nagy. I mean, is there anything in the record
5 that Mr. Nagy had ever seen this document that would go to
6 scienter?

7 MR. CLUKEY: Mr. Nagy was asked to talk to McDermott
8 in order to get a legal opinion. And there is documents in
9 the record that show that, that McDermott refused to give
10 them a legal opinion. Mr. Nagy has admitted that during his
11 deposition, that he talked to them and that he knows that no
12 opinion was ever obtained from McDermott, or any law firm,
13 and Mr. Debevc has also confirmed it, as has Mr. Charles
14 Cathcart.

15 MR. COOPER: That's McDermott. This is -- I'm going
16 to butcher the name -- Shartsis Frieze -- and he never saw
17 this. So they can talk about McDermott, but they can't
18 connect the dots on this. And at the very least, they would
19 have to lay the foundation at trial.

20 THE COURT: Okay. I think you will have to lay the
21 foundation at trial, because we may be here with just Mr.
22 Nagy, and I don't know whether there is any -- whether even
23 Mr. Debevc has ever seen this document.

24 MR. CLUKEY: He has and he testified during his
25 deposition.

1 THE COURT: Okay. So -- all right. So we'll do
2 that one at trial, too.

3 MS. WEIS: The next exhibit is Government
4 Exhibit 95.

5 THE COURT: Yeah.

6 MS. WEIS: There are 901, 802 objections to this by
7 both Mr. Nagy and Mr. Debevc.

8 THE COURT: So how are you going to authenticate it?

9 MS. WEIS: Mr. Polk will be coming to testify. He
10 will also be able to authenticate it, that it is a business
11 record that was maintained by him as an advisor to the 90%
12 Loan customers.

13 THE COURT: First was authentication.
14 What was the second objection?

15 MR. COOPER: 802, Your Honor. I'm so sorry about
16 that.

17 THE COURT: That's all right. No problem.

18 MS. WEIS: We believe both of those will be taken
19 care of in Mr. Polk's certification of this as a business
20 record under 803(6) and 901(11).

21 MR. COOPER: When you look at the e-mail, it talks
22 about being upset. I don't understand what that has to do
23 with tax advice. It's just inflammatory. It was written in
24 October of '05 after the bankruptcy was filed.

25 MS. WEIS: Well --

1 THE COURT: Go ahead.

2 MS. WEIS: We would have two responses to that.

3 One, we would have disagreement with Mr. Nagy about
4 whether or not the only relevant evidence is the exact memos
5 that were providing tax advice, and we disagree with that.

6 The sales personnel, Alison Skinner being one of the
7 sales personnel for Derivium, literally had access to fewer
8 facts than Mr. Nagy had access to in the course of his
9 participation in the 90% Loan Program. She is surprised by
10 revelations that Mr. Nagy knew throughout the entire time
11 that he was providing tax advice to Derivium.

12 MR. COOPER: I don't see tax advice in that
13 document. I see the word "hideous".

14 THE COURT: Yeah?

15 MR. CLUKEY: Your Honor, we addressed this
16 yesterday. And I keep going back to what statements may be
17 considered by the jury, what facts would be considered. And
18 so I feel like it's -- it's Ground Hog Day, in a sense, by
19 Mr. Cooper's argument that every document has to pertain
20 specifically to tax advice.

21 Dr. Paul Pfleiderer is going to testify that there
22 was no hedge in this program and that that was a false
23 statement, these were false statements underlying this
24 program.

25 So here we have a marketing person who understands

1 that there are false statements that were made. She is
2 simply communicating with a person who represents customers.
3 And this is during the time that penalties were assessed. So
4 it's end of 2005 and 2006. This is during -- during the
5 existence of the -- of the 90% Loan scheme.

6 MR. COOPER: Your Honor, I think this is a helpful
7 exercise.

8 I mean, in the binders we've provided to you is a
9 copy of the Statute, um, that you can understand, even though
10 it's Ground Hog Day, you know, maybe you can understand why
11 those cases say the facts have to pertain to the tax advice.
12 Because if not, this is going to blow -- this is not going to
13 become a tax case anymore, and they represent the IRS.

14 MR. CLUKEY: Oh, Your Honor, there is no 402 or 403
15 objection to this document, but --

16 THE COURT: I mean, this is a 2005 reaction to a
17 Forbes Magazine article. What does the Forbes article say?
18 That Derivium went bankrupt. I mean, is it -- the cat out of
19 the bag when Derivium goes bankrupt? I mean, the 90% Loan
20 scheme, isn't it over by then? I mean, they didn't sell
21 anything.

22 MR. CLUKEY: They did, Your Honor, after that.
23 There was -- the 90% Loan scheme was still going on in 2006.
24 That's not part of our case. It was still in existence
25 through on that.

1 THE COURT: Congressman Grayson was the only one
2 involved at that time.

3 MR. CLUKEY: There were a number of folks who
4 apparently didn't get the message.

5 THE COURT: All right. We'll do this one the
6 old-fashioned way, okay, if we need to.

7 MR. CLUKEY: Very well, Your Honor.

8 MS. WEIS: Next exhibit is Government Exhibit 123.
9 It's a letter from Pat Kelly to Don Hancock dated
10 January 31st of 2002.

11 THE COURT: Okay. And what's the objection to that
12 one?

13 MS. WEIS: There are 802, 402 and 403 objections
14 made by both Mr. Nagy and Mr. Debevc.

15 THE COURT: Okay. Yeah?

16 MR. COOPER: I won't repeat myself, from the face,
17 Mr. Nagy nowhere found tax advice. It has nothing to do with
18 his tax advice.

19 THE COURT: The facts that he knew or should have
20 known has something to do with his tax advice. I don't think
21 you can take the position that, you know, I give tax advice,
22 but I don't know any facts unless he's -- that's not his
23 position, is it? I don't know nothing about nothing, I'm
24 just going to give you a tax letter saying that this is okay
25 without knowing anything behind it?

1 MR. COOPER: Well, he knew certain things behind it.
2 Um, this obviously is not relevant to his tax advice. I
3 mean, in particular, Your Honor, this whole line of
4 questioning we would have seen at the trial with Mr. Hancock,
5 and I read it from what they designated.

6 And what they are going to show is what's in these
7 statements was allegedly false to that client. My client had
8 nothing to do with that. He was an outside accountant
9 working by the hour.

10 And in fact, I mean, if Mr. Debevc is in trial, I
11 would want to discuss possibly giving the jury some kind of
12 instruction up front to understand that documents that Mr.
13 Nagy was not privy to, or had knowledge of, should not be
14 taken into consideration.

15 Because, I mean, the -- I'm sincerely scared about
16 all this coming through and it meshing in the jury's mind
17 when Mr. Nagy is not a part of any of this and he didn't
18 consider it when he gave his tax advice.

19 MS. WEIS: Your Honor, we would say the exhibit is
20 one of the documents demonstrating false statements that were
21 made to customers, and also go towards the operation of the
22 entire scheme.

23 Now, we understand Mr. Nagy's position is that he
24 was simply an outside advisor operating on an hourly basis,
25 as Mr. Cooper said, but we believe that the evidence at trial

1 will show that he was quite intimately involved in the 90%
2 Loan Program. And this is circumstantial evidence of, you
3 know, knowledge he should have had about false statements
4 being made, as well as the operation of the program. Mr.
5 Kelly can also testify to this.

6 THE COURT: Okay. Let's see what Mr. Kelly has to
7 say.

8 I notice from the exhibits it says, "We held in the
9 account of General Holdings." They didn't hold anything,
10 okay? The jury could determine whether that's not the truth.

11 Now, whether they have to connect it with Mr. Nagy
12 or not, that's certainly the Government's burden.

13 MR. COOPER. Right. I mean, listen, we'll concede
14 they sold the stock and he told the IRS that.

15 THE COURT: It's hard not to concede that because
16 it's true. Nobody takes the position he didn't sell the
17 stock.

18 MR. COOPER: He told the IRS that.

19 So I mean, this letter, we will stipulate that the
20 stock was sold. I don't -- you know, it was sold. He'll
21 concede that, and he took that into account and knew about it
22 when some of his opinions were given later in 2002.

23 THE COURT: All right. Well, we'll have to listen
24 to Mr. Kelly.

25 MS. WEIS: The next is Government Exhibit 125, which

1 is a cover page fax from Mr. Cathcart to Don Hancock. I
2 imagine the Court is familiar with the document and its
3 attachment, which --

4 THE COURT: Let me see the next page.

5 MS. WEIS: It's a letter purporting to be from
6 Bancroft Ventures Ltd. to Dr. Cathcart concerning --

7 THE COURT: And the last page?

8 Okay. Which one of the Manx signed this one?

9 MS. WEIS: I'm sorry?

10 THE COURT: Which one of the Manx signed this? The
11 people from the Isle of Man are called Manx.

12 MS. WEIS: Actually, there is no 901 objection to
13 it, and there is an 802.

14 But we believe this document to have been a
15 fabrication, and there will be testimony to that effect.

16 We are not offering the letter, or quite frankly the
17 representations made by Dr. Cathcart, for the truth of the
18 matter asserted. So the 802 objection that Mr. Nagy
19 registered we don't believe applies.

20 As to their remaining objections, which are 402 and
21 403, both Mr. Debevc and Mr. Nagy raised, you know, again, it
22 goes to knowledge of the illegitimacy of the scheme, which we
23 believe was communicated to Mr. Nagy and Mr. Debevc, and the
24 operation of the program, false statements that were being
25 made to cover up the, what we say to be the fairly obvious

1 nature of the program, as not containing legitimate lending.

2 THE COURT: It's just -- the closure, the Bancroft
3 closure to this letter, is that going to be testified to by
4 one of the Brits?

5 MR. CLUKEY: Yes. One of the Isle of Man.

6 THE COURT: And he's going to say, I do this letter,
7 this isn't our letter, somebody fabricated the whole thing?

8 MR. CLUKEY: Actually, there is two individuals who
9 will testify to that.

10 THE COURT: All right. I think we are not making
11 much headway, and I'm not so sure we are going to make any
12 headway if we are going to go through those one by one.
13 Until I get the testimony, there is really nothing much I can
14 do about it.

15 MS. WEIS: Well, Your Honor, we can address a broad
16 issue --

17 THE COURT: Okay.

18 MS. WEIS: -- that perhaps at least we can raise
19 today and resolve today.

20 THE COURT: Sure.

21 MS. WEIS: Mr. Nagy has made a number of 802
22 objections to exhibits that we will be offering for the truth
23 of the matter asserted. And we would like to discuss why we
24 believe that statements made, for instance, by Dr. Cathcart,
25 and to others that are, you know, that Mr. Debevc, Derivium's

1 records, etcetera, are not hearsay against Mr. Nagy.

2 Which is that we believe that the coconspirator
3 exception to 801(d)(2)(E) applies. We have a short brief
4 prepared, we provided to the other side and to Your Honor for
5 consideration.

6 THE COURT: Okay. Good.

7 MS. WEIS: So Your Honor, just the first thing to
8 point out is that it's already been established and conceded
9 in this case that Mr. Nagy and Mr. Debevc participated in a
10 plan or arrangement under Section 6700.

11 And as the cases that we cite in the brief discuss,
12 it's not necessary to show criminal conspiracy or conspiracy
13 as a, you know, in a criminal sense to be considered, but
14 simply for there to be a business venture or a common goal.

15 Even merely two people working together to fire an
16 employee, which there is a Fourth Circuit case on that, has
17 found that is sufficient for there to be a conspiracy.

18 Given that Mr. Nagy and Mr. Debevc are part of the
19 same plan or arrangement, and part of their participation, we
20 believe they are coconspirators, as well as Derivium and Mr.
21 Cathcart, they're employees under the Rule.

22 THE COURT: Coconspirators in the evidentiary sense?

23 MS. WEIS: Correct. We are not talking about
24 anything other than that.

25 THE COURT: I got you. All right.

1 So it sounds like something for 9:00 Monday morning.
2 I mean, that's -- unless you are ready now.

3 MR. COOPER: No. I haven't been conspiring with
4 them.

5 THE COURT: Okay. This is not a joint undertaking,
6 so you can't do it now. All right.

7 MR. CLUKEY: Your Honor, to shorten this, do you
8 mind if we just -- to give a couple that we're more
9 interested in, do you mind if we take five minutes to run
10 through that, and that will save some significant time?
11 Because there are a number of these, if we pull them up one
12 by one, that are going to fall into the Kelly category that
13 you've already ruled.

14 THE COURT: I don't understand what you just asked
15 me to do.

16 MR. CLUKEY: I'm sorry. Do you mind if we take a
17 five-minute break to narrow --

18 THE COURT: And then you can call Washington, too.
19 And it's raining outside, too, so you can't leave anyway, all
20 right?

21 So y'all just, when you are ready, just call me and
22 I'll come back down all right?

23 MR. CLUKEY: Thank you, Your Honor. We would
24 actually -- there are a number of additional things we've
25 gone through that there are no objection to that we would

1 like to move in, and then we just have three to argue.

2 THE COURT: Sure.

3 MR. CLUKEY: Okay.

4 (Thereupon, there was a brief recess.)

5 MR. CLUKEY: Should we go through the ones to which
6 there are no objection?

7 THE COURT: Yeah. That would be good.

8 MR. CLUKEY: These are out of order.

9 THE COURT: That's what I pay Gail for.

10 MR. CLUKEY: 334, 344, 80, 248, Exhibit 94, the only
11 objection is it was three documents. Would you be -- would
12 you be happy with us -- with making it 94 A, B and C?

13 MR. COOPER: I can't -- if he would just let me look
14 at it real quick.

15 THE COURT: Go ahead and look at it real quick.

16 MR. COOPER: Are there more?

17 MR. CLUKEY: That's the only --

18 MR. COOPER: Those are the only three?

19 MR. CLUKEY: 27, 219, 218, 80 -- I'm sorry, I think
20 I already mentioned 80 -- 150, 26, 57, 216, 336, 220, 183,
21 228, 230, 147, 261 and 342.

22 THE COURT: Go ahead and let him look at 94.

23 MR. CLUKEY: Of course.

24 THE COURT: Are y'all waiting on me?

25 MR. COOPER: No. They are out of order. I'm sorry,

1 no.

2 THE COURT: I just didn't want -- take your time.

3 MR. COOPER: I want to just read them back in the
4 order.

5 THE COURT: Okay.

6 MR. COOPER: No objection to 334, 344, 80, 248, 9,
7 27, 219, 218, 150, 26, 57, 216, 336, 220, 183, 228, 230, 147,
8 261, 342. That's all of them.

9 MR. CLUKEY: And what about 94? It was the three
10 documents together.

11 MR. COOPER: That's fine if they separate them.

12 THE COURT: So 94, A, B and C?

13 MR. COOPER: A, B and C. Yes, Your Honor.

14 THE COURT: Okay. Good.

15 (Thereupon, Government Exhibit Numbers 334, 344, 80,
16 248, 9, 27, 219, 218 150, 26, 57, 216, 336, 220, 183, 228,
17 230, 147, 261, 342 and 94 A, B and C were received in
18 evidence.)

19 MR. CLUKEY: 189. Your Honor, the only objection to
20 this, there are two objections, 402 and 403 on this exhibit.

21 MS. WEIS: I can pull up the attachment.

22 THE COURT: Sure.

23 THE COURT: What does FRN mean?

24 MR. CLUKEY: The FRN, there was the 90% Stock Loan
25 and there was -- part of that they were selling, instead of

1 using stocks as the supposed collateral, they would use FRN
2 as floating rate notes.

3 So Mr. Nagy, in his own tax advice, actually told
4 Derivium at one point that he thought the FRN program would
5 violate the tax laws.

6 So he has a change of heart in 2005 -- well
7 actually, he has a change of heart earlier -- but this is
8 reflecting forming a new company in connection with
9 administering those loans.

10 MR. COOPER: Your Honor, this memorandum, the e-mail
11 was sent on July of '05, and none of the assessments for Nagy
12 are for this time period. So it would be irrelevant because
13 it's after the fact.

14 Secondly, he testified this company never came to
15 fruition and it doesn't go to his tax advice.

16 MR. CLUKEY: If I may address that?

17 THE COURT: Sure.

18 MR. CLUKEY: Mr. Nagy was assessed penalties for
19 2005.

20 Secondly, this is a program that is now under, at
21 this point in time, is under attack by the IRS. It's under
22 attack by the Franchise Tax Board. Derivium is filing for
23 bankruptcy because it's been sued by so many customers at
24 this point in time, and Mr. Nagy is proposing with Mr. Debevc
25 to form to administer these illegal FRN programs.

1 That, we believe, clearly goes to whether he knew or
2 had reason to know that the tax advice he provided was not
3 truthful.

4 THE COURT: Is there another -- is there another
5 page or just one page?

6 MS. WEIS: Yeah.

7 THE COURT: Okay. Yes?

8 MR. COOPER: Yes, Your Honor.

9 You are aware that even though Derivium filed
10 bankruptcy, people still had loans and they had to do things.
11 This never came to fruition. It doesn't go to his tax
12 advice. He didn't, obviously after Derivium filed
13 bankruptcy, he didn't provide Derivium tax advice anymore.
14 And it's an after-the-fact memorandum, nothing that came to
15 fruition.

16 THE COURT: Yes, sir?

17 MR. CLUKEY: Your Honor, if -- the jury is entitled
18 to consider actions -- and there is actually a case called
19 *Harkins* that goes to all the circumstantial evidence
20 surrounding a person's conduct. And *Harkins* is a case in the
21 District of Oregon that considered simply refusal to comply
22 with discovery, and that was a factor that went into the
23 person's scienter, who knew or had reason to know.

24 This is actually occurring during the time of the
25 scheme. The scheme -- Optech is still in existence. New

1 loans are still done in 2006. Mr. Nagy, everyone knows that
2 this thing is illegal by this point in time. He certainly
3 knows the IRS is challenging it because they've told him.
4 They've told everybody.

5 Here he is, any law-abiding citizen, one would
6 think, or at least the jury is entitled to consider whether
7 someone who is truly a law-abiding citizen would pose forming
8 a new company to administer an illegal product and penalties
9 were assessed at the same time.

10 MR. COOPER: Your Honor, I mean, this -- the law
11 abiding -- the only time that anyone ever ruled that this was
12 a sale was Judge Hamilton in California, and Your Honor has
13 the distinction of being the second person to rule that.

14 So until 2009, there was never a ruling, and it
15 wasn't illegal.

16 And you know -- in fact, the jury instruction -- the
17 jury should be instructed that the lack of law goes to intent
18 as the *Dahlstrom* cases go to.

19 So the insinuation it was illegal at this time is
20 wrong. In fact, I briefed it. If it was illegal, am I a
21 coconspirator now? I mean, um --

22 THE COURT: You don't want to talk yourself into
23 anything.

24 MR. COOPER: I know, especially with the Justice
25 Department here, but I'm just --

1 THE COURT: You, too.

2 MR. COOPER: People had loans and Derivium customers
3 filed proof of claims with the bankruptcy saying, give me my
4 collateral back. Obviously, they believed it was a loan and
5 they weren't doing anything illegal. So this does not go to
6 his tax advice.

7 MR. CLUKEY: Your Honor, this goes entirely to what
8 Mr. Nagy knew or had reason to know.

9 The IRS has told him by this point in time this
10 thing is a tax shelter. California's Franchise Tax Board has
11 told him it's a tax shelter. Customers are being frauded and
12 Derivium is refusing to give them back their stocks because
13 all this is a scam. All of this is circumstantial evidence
14 of whether he knew or had reason to know.

15 The *Dahlstrom* cases have been briefed and those are
16 criminal cases. The leading case on this, the *Estate*
17 *Preservation* case, specifically addresses *Dahlstrom*, and
18 that's been briefed by both parties.

19 THE COURT: Okay. All right. Get it back to the
20 first page.

21 So this has got two stickers on it. This is
22 Government Exhibit 189 against Plaintiff's Exhibit Number 1
23 from the Nagy deposition?

24 MR. CLUKEY: Yes, Your Honor.

25 THE COURT: All right. I'll overrule your objection

1 to that.

2 MR. CLUKEY: Our next one is 58, Your Honor.

3 I'm sorry. Can we move in 189 into evidence, then,
4 Your Honor?

5 THE COURT: Yeah, it's in evidence. He's preserved
6 on the objection.

7 I mean, it's relevant -- um, you know, there is lots
8 of things that make it relevant. I mean, you can see -- I
9 mean, the exhibit that Mr. Nagy is in the same building, I
10 believe, with some of the other people that are involved in
11 all this kind of stuff, so that, plus the -- I hate to use
12 common scheme or plan, but that seems to -- yeah?

13 MR. COOPER: He wasn't in the same building, Your
14 Honor.

15 THE COURT: Well, 10 Maritime Street, whatever that
16 building is, the first page of that.

17 MR. COOPER: With Derivium or 10 State Street.

18 THE COURT: 10 State Street, yeah. 180 East Bay
19 Street.

20 And at one time or another, if I remember from the
21 last trial, 180 East Bay Street was where Mr. Debevc was,
22 that the supersonic transport computer -- I may be wrong, I
23 may be misremembering that.

24 Did you ever own 180 East Bay Street?

25 MR. DEBEVC: No, sir. I'm just there from time to

1 time, but did not have an office.

2 THE COURT: Were you early in the -- I know -- is
3 Poston Road one of the addresses?

4 MR. DEBEVC: Right. And the claim that Mr. Grayson
5 made about the copy check, I think that he is very, very
6 imaginative, because there is no sense there.

7 THE COURT: Well, since this is on the record, I
8 won't comment on that, okay? I won't disagree with you, or I
9 won't agree with you, all right? There is no comment.

10 Who was at 180 East Bay Street?

11 MR. DEBEVC: John Kern. His office is at 180 East
12 Bay Street, as did 10 State Street, and also Robert Nagy.

13 THE COURT: Okay. All right. I knew it was
14 somebody. So -- it's been a long time and a lot of water
15 under the bridge, so -- okay.

16 Let's look at 58, right?

17 (Thereupon, Government Exhibit Number 189 was
18 received in evidence.)

19 MR. CLUKEY: Yes, Your Honor.

20 So 58 is -- it's a 402, 403 objection.

21 And this is a document that came from Mr. Nagy's
22 files. And it's the operating agreement for First Security
23 Capital.

24 Now, this is the cover -- so this is the cover
25 letter, I'm sorry, attaching the operating agreement. And

1 Mr. Nagy testified that's his handwriting under -- on top of
2 the operating agreement for Derivium Capital. So he received
3 this document and he admits that.

4 And the import of this document is, Tim Scrantom,
5 Tim is telling the participants in the scheme that they are
6 going to back -- they are going to create an operating
7 agreement and they are going to backdate it.

8 So if we could flip ahead whenever you are ready.

9 THE COURT: Okay. Go ahead.

10 MR. CLUKEY: So here is the operating agreement.
11 That's January 2, 1998.

12 THE COURT: Okay.

13 MR. CLUKEY: Mr. Debevc has testified that that was
14 not signed on that date. And he said it was impossible it
15 was signed on that date.

16 And go back. So we believe this -- this document
17 shows the scope and extent of Mr. Nagy's involvement in this
18 scheme.

19 THE COURT: And the last page with the cover letter
20 says to Robert Nagy, hand delivered. And Mr. Nagy in his
21 deposition said he received it --

22 MR. CLUKEY: Yes.

23 THE COURT: -- as part of his files?

24 MR. CLUKEY: Yes.

25 THE COURT: All right. And what does it make more

1 or less likely in this case, which is the 402?

2 MR. CLUKEY: His knowledge of the structure of the
3 scheme and his involvement in the structure of the scheme.
4 He claims he was an independent, outside, third-party, really
5 didn't know the inner workings of Derivium, and this shows
6 otherwise.

7 THE COURT: Okay.

8 Yes, sir?

9 MR. COOPER: Well, I mean, they provided him with an
10 operating agreement.

11 And as you can see, they are going to bring in these
12 issues where the lawyer hands it along. He didn't have
13 anything to do with it, but they are going to be bringing up
14 these backdating issues, and it's irrelevant to his tax
15 advice.

16 In fact, it would be inflammatory. When someone
17 does something, they just hand him a document, and just
18 because you have it in the file, it doesn't mean anything.

19 THE COURT: It's kind of like the McDermott Will &
20 Emery memorandum, because you don't file it, it doesn't mean
21 anything.

22 MR. COOPER: That's tax advice on the 90% Stock Loan
23 Transaction.

24 THE COURT: That's tax advice on something, not the
25 90% Stock Loan. That doesn't have anything to do with the

1 90% Stock Loan in this case.

2 MR. COOPER: Mr. Straus says in that declaration he
3 referred people in Derivium under his program to the
4 90% Stock Loan Program.

5 THE COURT: Mr. Straus's declaration is not in
6 evidence. It can't be going into evidence. He's not going
7 to testify, is he?

8 MR. COOPER: No, Your Honor, but it can be used to
9 authenticate the document's reliability.

10 THE COURT: That's two separate things. You are
11 talking about authentication, you are talking about evidence.
12 That's not evidence of anything that is going to come into
13 this trial.

14 MR. COOPER: What's not evidence?

15 THE COURT: His declaration.

16 MR. COOPER: No, it's for authentication.

17 THE COURT: It's not going to the jury. I just
18 didn't want you to --

19 MR. COOPER: I understand that.

20 THE COURT: I just wanted to make sure.

21 MR. COOPER: It's meant to convince you that that
22 document is reliable under 901.

23 THE COURT: All right. I'll overrule your
24 objection. It seems to be relevant to one or more of the
25 issues in this case, number one.

1 Number two, under 403, the probative value of the
2 operating agreement and this letter, which was found in Mr.
3 Nagy's files, was not greatly outweighed by the prejudice,
4 okay?

5 So 58 in evidence.

6 (Thereupon, Government Exhibit Number 58 was
7 received in evidence.)

8 MR. CLUKEY: 343.

9 THE COURT: That's authenticated and he's identified
10 it and all that kind of stuff.

11 MR. CLUKEY: It's only 402 and 403.

12 THE COURT: Okay. Good. Thank you.

13 THE COURT: Okay. What, under 402, what relevance
14 is this?

15 MR. CLUKEY: This is relevant, Your Honor, again to
16 show his involvement in the scheme.

17 He's talking about taking credits for BVI, I think
18 that's BVI's books, which is the one of the fake foreign
19 lenders here. And he's talking to Charles Cathcart about
20 money that he needs to get in connection with the schemes.

21 It's directly regarding his compensation that he
22 received for a whole host of activities that he's doing. And
23 there is, remit payment to Shenandoah.

24 So there are a number of things. It's relevant on a
25 number of grounds, Your Honor, to show his involvement in the

1 scheme.

2 THE COURT: Did you -- did you ask him about this in
3 his deposition?

4 MR. CLUKEY: Actually, I don't recall.

5 THE COURT: Okay. How about it, Mr. Cooper?

6 MR. COOPER: Well, to me it just seems like
7 bookkeeping entries and needing to transfer money. And
8 again, I mean, I keep on pounding on the fact this is about
9 his tax advice in a tax case.

10 THE COURT: I think we'll have to do this one the
11 old-fashioned way. I'm going to have to get -- I can
12 understand the operating agreement of Derivium, this is a
13 little foggier. I'm not sustaining the objection, I'm not
14 overruling the objection.

15 Do what you do and I'll mark it.

16 MR. CLUKEY: Can we raise one final exhibit?

17 THE COURT: Sure.

18 MR. CLUKEY: 200.

19 THE COURT: 200. Okay.

20 MR. COOPER: Will I still get a quick turn after
21 this?

22 THE COURT: Sure. You are no longer a
23 coconspirator, how about that?

24 MR. COOPER: Can I submit an order, Your Honor, that
25 says that?

1 THE COURT: In South Carolina law, there is a
2 possibility of reverter in property, so there may be a
3 possibility of reverter in a conspiracy, too. So you might
4 get --

5 MR. COOPER: My law clerk who is going to come work
6 for me, if you talk about property reversion, she might break
7 out in a sweat.

8 MR. CLUKEY: Your Honor, when you are ready, this
9 document continued more on the second page.

10 THE COURT: Okay. Second page.

11 Okay. Yes, sir?

12 MR. COOPER: Your Honor, this whole document, they
13 are going to use it to show that Mr. Nagy took a loan from
14 one of the companies for personal needs at that point in
15 time.

16 It's prejudicial. It doesn't add any significance
17 to his tax advice. We would ask that you keep it out for the
18 prejudicial value.

19 MR. CLUKEY: Your Honor, this document goes directly
20 to Mr. Nagy's role in the scheme.

21 And if you look at the bottom paragraph, we -- so
22 it's true, this does relate to a loan, very substantial loan,
23 which goes to whether Mr. Nagy was actually providing tax
24 advice and conflicts of interest.

25 Secondly, so we look down here in the last

1 paragraph: "We have not discussed the matter of interest on
2 that." "We appreciate your assistance." "When I desperately
3 need it." "From my standpoint." "My number one priority
4 position."

5 So this really goes to the heart of what Mr. Nagy
6 really is, an independent accountant. "Hopefully, I have
7 been of significant assistance to you." "Virtually since the
8 inception of our relationship."

9 And then he says, a couple of sentences down:
10 "Respectfully request that we forego interest on the
11 balance."

12 So here he is at this point in time in 2002 --

13 THE COURT: '3, I think.

14 MR. CLUKEY: Sorry, '3. In 2003, the height of the
15 scheme, the scheme goes on for many years. And so we now
16 learn from this document that he considers Derivium his
17 number one priority client.

18 THE COURT: Yes, sir?

19 MR. COOPER: Again, I mean, with the bringing up not
20 for his tax advice, but it's a character assessment of Mr.
21 Nagy of taking a loan from a client and putting this in front
22 of the jury to try to skew them. There is no value in this
23 under 6700.

24 When you look at the Statute, what was his tax
25 advice? I mean, as I raised yesterday, I mean, that first

1 part of the Statute, did he participate in it? I mean, we
2 give it up. It's the tax advice, you know, in the heart of
3 the matter.

4 But even in a participation of the scheme, this is
5 him taking a personal loan for personal reasons, and the
6 prejudicial effect of this is outweighed by the probative
7 value.

8 MR. CLUKEY: Your Honor, the legislative history and
9 the Statute --

10 THE COURT: I think you got that backwards. You
11 mean the probative value is outweighed by the prejudicial --

12 MR. COOPER: Thank you, Your Honor.

13 THE COURT: No problem. I do that all the time. So
14 I have been there, done that.

15 Yeah?

16 MR. CLUKEY: The Statute and the legislative history
17 specifically indicate that knowledge may be imputed to
18 someone based on their role in the enterprise, and it's
19 whether you knew or had reason to know. And so this clearly
20 goes to Mr. Nagy, directly goes to Mr. Nagy's role.

21 MR. COOPER: But what's the activity here? It's
22 taking a loan from a client for personal reasons.

23 MR. CLUKEY: The activity is --

24 MR. COOPER: What does that have to do with the
25 activity of Derivium setting up a 90% Loan structure?

1 MR. CLUKEY: It's circumstantial evidence regarding
2 his role in the scheme. It's also his admission that
3 Derivium is not just any one of his clients, which in various
4 pleadings it's been asserted before that Mr. Nagy had many
5 clients and Derivium is just one of his clients, that
6 corrects that misimpression.

7 THE COURT: Okay. I'll overrule your objections
8 under 402 and 403.

9 (Thereupon, Government Exhibit Number 200 was
10 received in evidence.)

11 MR. COOPER: Your Honor, I would just like to
12 address some exhibits I would like to use in my opening.

13 THE COURT: Sure. Have they been marked into
14 evidence?

15 MR. COOPER: Yes, Your Honor. They are in those
16 books for you.

17 THE COURT: Like I said yesterday, if they are
18 agreed into evidence, you can use them.

19 MR. COOPER: No, this was the MIL, the IDR -- the
20 motion in limine. They objected on the motion in limine --
21 this is the -- Exhibit Number 1 is the IDR, is the
22 informational document requests the IRS sent to Mr. Nagy. I
23 would like to use those in the opening.

24 THE COURT: I mean, if they are in evidence, you can
25 use them in opening. If there is objections to them, you

1 can't use them in opening.

2 MR. COOPER: There is still a 402 and 403.

3 THE COURT: So we are going to go through that now?

4 MR. COOPER: If you don't mind.

5 THE COURT: That's no problem, yeah.

6 Are you done, Mr. Clukey?

7 MR. CLUKEY: Yes, Your Honor.

8 THE COURT: All right. Have you -- have you heard

9 back from people that are working overtime in the Nation's
10 Capital to answer your question?

11 MR. CLUKEY: I have, Your Honor. There is a bit of
12 disagreement.

13 THE COURT: So is it -- the disagreement means that
14 it's still under consideration, that you are going to talk
15 about it, or does the disagreement mean that Mr. Debevc, you
16 need to be here Monday morning at 9:00?

17 MR. CLUKEY: We are still talking about it, but Mr.
18 Debevc as of this time still needs to be here Monday.

19 THE COURT: That's fine. So if, in fact, something
20 this weekend happens, y'all have Frank's e-mail address, and
21 so we will have to retaylor some things. So let us know as
22 soon as y'all know one way or the other. If it's over, it's
23 over; if it's not over, it's not over, okay?

24 MR. COOPER: May I approach the bench?

25 THE COURT: You bet. Mr. Cooper, are these our

1 copies of your exhibits?

2 MR. COOPER: Yes, Your Honor.

3 THE COURT: Why don't you give them all to me?

4 MR. COOPER: She has to --

5 THE COURT: The boss has spoken. All right.

6 When I was practicing, when I put my hand on a
7 document, the paralegal said no and she would also slap my
8 hand. So I know where you are coming from, okay? All right.

9 MR. COOPER: Would you mind striking that from the
10 record, so we don't know who my boss is?

11 THE COURT: Okay. So this is a five-page form 4564.

12 MR. COOPER: Yes, Your Honor. Each page is a
13 separate informational document request that the IRS sent to
14 Mr. Nagy --

15 THE COURT: Okay.

16 MR. COOPER: -- when they were auditing Derivium
17 from 2000, 2003.

18 THE COURT: Okay.

19 MR. CLUKEY: Your Honor, there are a number of these
20 documents like this that were in the IRS's files and they
21 have handwriting on them. And you've already ruled, I think,
22 on -- and we objected obviously under relevance grounds -- I
23 think you overruled us on that.

24 And so to the extent this is coming in, we would
25 like any of these documents to have them, information that

1 was not transmitted to Mr. Nagy, which is consistent with
2 your ruling, that that be redacted.

3 THE COURT: Okay. So the handwriting?

4 MR. CLUKEY: Yes, Your Honor.

5 THE COURT: All right. And assuming that I haven't
6 changed my mind about what I've already -- all right. Of
7 course the handwriting on page 1, there is handwriting that
8 says Bob Nagy, that's going to be very difficult to redact.

9 MR. CLUKEY: That's not Mr. Nagy's handwriting.

10 THE COURT: Okay.

11 MR. CLUKEY: It's the agent's handwriting. This was
12 not communicated back -- so this is -- Bob Nagy sent it, and
13 Bob Nagy sent this document to -- oh, I'm sorry. So the IRS
14 sent this to Bob Nagy, right? And then this is a copy they
15 have in their files, and they made a handwritten notation
16 based on responses, or whatever it is, but it's information
17 that was not received by Mr. Nagy.

18 This is the Government's production to opposing
19 counsel and Mr. Debevc, and it happened to have this
20 handwriting on it.

21 THE COURT: So if you look on the upper right-hand
22 corner, it says, "submitted to Bob Nagy," that was not in the
23 original one, or -- I mean, so --

24 MR. CLUKEY: For that, we have no objection to that,
25 but it's the rest -- it's the other margin.

1 THE COURT: The margin on, looks like outside of 11,
2 14, 15, 16 and 20?

3 MS. WEIS: And 19, Your Honor.

4 THE COURT: And 19? Okay. Yeah. And that's -- any
5 objection to cleaning that page up?

6 MR. COOPER: Can I raise this in connection with
7 another exhibit that's redacted, which is Exhibit 4 in your
8 binder? Because my understanding of your ruling was, is the
9 information from the audit file could come in if it reflected
10 what was communicated between the auditor and Bob Nagy, so
11 there was a direct correspondence.

12 And if you look to paragraph 4 or to -- well,
13 especially if you will go to Exhibit 5, Your Honor, the
14 handwritten notes of the auditor, Neva Gadsden. And she took
15 those notes and testified she took these notes during a
16 personal interview with Mr. Nagy. So it was what Mr. Nagy
17 was communicating to her actually about the topics on
18 Exhibit 1, which is the IDR.

19 The way it happened was she issued the IDR to Mr.
20 Nagy. They met on December 4th and they had an interview
21 going over all these topics. And the handwritten notes
22 behind Exhibit 5 reflect the substance of that conversation.

23 And under your ruling, the way I understand it,
24 information that reflected direct communication back and
25 forth about what happened and he had personal knowledge of

1 during the audit could stay in and be introduced at trial.

2 Because this will help Ms. Gadsden understand,
3 remember what she talked about with Mr. Nagy, and what he
4 told her.

5 And I have deposed her on all the pages in here and
6 she has said that he communicated this information to her.

7 THE COURT: I think my ruling was any information in
8 the IRS audit file that was communicated to Mr. Nagy, not
9 back and forth to Mr. Nagy, the -- Exhibit 1 was communicated
10 to Mr. Nagy?

11 MR. COOPER: Right.

12 THE COURT: Exhibit 5 was not?

13 MR. COOPER: But that was a -- I thought your ruling
14 was of what he had direct knowledge of and communication, and
15 this would reflect exactly what he told her during the
16 interviews.

17 THE COURT: Now, my understanding that Exhibit 1 was
18 communicated from the IRS to Mr. Nagy, nobody disputes that,
19 right?

20 MR. CLUKEY: No, Your Honor.

21 MR. COOPER: No, Your Honor.

22 THE COURT: The dispute on page -- on the first page
23 is whether the margin area was communicated from the IRS to
24 Mr. Nagy?

25 MR. CLUKEY: Yes, Your Honor.

1 THE COURT: And you want the marginalia excluded?

2 MR. CLUKEY: Correct.

3 THE COURT: Is there any problem with that?

4 MR. COOPER: The marginalia, no. For that exhibit,
5 no.

6 THE COURT: All right. Now, number 5 is Ms.
7 Gadsden's notes that she took in her interview of Mr. Nagy
8 with regard to his responses to Exhibit 1, right?

9 MR. COOPER: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. CLUKEY: Or in connection with the --

12 MR. COOPER: Can I point out the significance of
13 this?

14 If you turn to U.S. 20, within that file, the Bates
15 stamp number, Your Honor.

16 THE COURT: Oh, okay.

17 MR. CLUKEY: Which exhibit?

18 MR. COOPER: Exhibit 5.

19 And if you look at U.S. 20, Ms. Gadsden testified
20 here Mr. Nagy, in the very first interview, discloses to her
21 the stock loan transaction and the steps of the stock loan
22 transaction.

23 And we believe that's highly important for Mr. Nagy
24 because they are saying conspiracy. We are saying Mr. Nagy
25 told them everything. And Ms. Gadsden said that she took

1 these notes.

2 And if you look to the left, "client has three
3 choices of maturity," he lays it all out. At the top,
4 "client transfers stock to Derivium." Down below, "they have
5 control over the lender's brokerage account".

6 So it was all disclosed to her. And in order to put
7 the audit in context in what Mr. Nagy did communicate, this
8 is objective evidence verifying what he told her.

9 And Ms. Gadsden, in her deposition, concurred with
10 all that.

11 MR. CLUKEY: Your Honor, your ruling, as I
12 understood it, said information that was not provided to Mr.
13 Nagy was out.

14 And that was in accordance with that case that we
15 discussed when we actually had the hearing, the *Secord* case,
16 the very high profile Iran-Contra case, where General Secord
17 made exactly the same argument, that I am entitled in a
18 discovery matter to discover the executive files and to have
19 those files and I can present those to -- as corroboration of
20 what was going on.

21 And so whether this information was communicated or
22 not to Mr. Nagy, he can -- Mr. Cooper, as I understand, is
23 calling Neva Gadsden to be a witness in this case, and he can
24 ask her about what she told him. These are her internal
25 notes. I doubt all this information -- I highly doubt all

1 this information was communicated to him verbally, first of
2 all. And we know without a doubt these notes were not
3 communicated to him, the notes themselves.

4 MR. COOPER: The *Secord* case is what we were trying
5 to show, you remember where the IRS made the internal
6 memorandum to the Office of Tax Shelter Analysis, those were
7 activities that Mr. Nagy had no direct activity with.

8 And I believe the *Secord* case wasn't as broad as Mr.
9 Clukey is saying. It had to do with what he had direct
10 participation with. And this is direct evidence of his
11 direct participation in the audit and what he told the
12 revenue agent.

13 THE COURT: All right. For the purposes that you
14 are asking for to get it in, so you can use it in your
15 opening argument, the answer is no. We may be able to get it
16 in during the trial, but not now.

17 MR. COOPER: Okay. I just wanted to address the
18 issue because I redacted some of the document -- I have
19 redacted the documents the same way. That if there was a
20 communication with which Mr. Nagy had a direct communication
21 or the IRS left a phone message or the IRS called him and the
22 document reflects that call, I have left that unredacted.

23 THE COURT: Okay.

24 MR. COOPER: Okay?

25 THE COURT: But I guess, keep the initial part and

1 get -- that you said you wanted to use Exhibit 1 in your
2 opening statement, and as redacted, it's in evidence, you can
3 do it, okay?

4 MR. COOPER: I'm sorry. My mind -- I just -- we
5 started talking about redaction, so I wanted to bring up --

6 THE COURT: That's no problem. That's, you know,
7 all right.

8 Any other one that you want to talk about that you
9 want to use in your opening argument?

10 MR. COOPER: Yes, Your Honor. Exhibit 19.

11 THE COURT: 19.

12 MR. COOPER: And in there there is two exhibits.
13 The second exhibit has got the marginal notes in it. We'll
14 simply take that out, if that's okay with Your Honor, to
15 solve that problem.

16 MS. WEIS: Your Honor, there is also highlighting to
17 those documents.

18 MR. CLUKEY: I guess I'm not sure -- I'm not even
19 sure what this document is.

20 THE COURT: Wait a minute. I didn't understand a
21 word you said, Ms. Weis.

22 MS. WEIS: There is highlighting on the document, as
23 well, which we believe the IRS placed on the document. So
24 it's an additional issue.

25 MR. CLUKEY: Your Honor, the first page it says:

1 "Neva, for your information" -- "have a great day, Miriam."

2 Again, this information was never communicated to
3 Mr. Nagy. He never saw that. And this is his own memo. I
4 guess I'm failing to understand even --

5 THE COURT: Don't you have one that's a copy that
6 doesn't have the marginalia on it?

7 MR. COOPER: Well, we'll redact it, Your Honor.

8 THE COURT: I mean, I don't think --

9 MR. COOPER: It's kind of innocuous. I mean, "have
10 a nice day".

11 THE COURT: Innocuous is in the eye of the beholder.
12 If it's innocuous, then it's irrelevant, throw the whole
13 thing out. How about that?

14 MR. COOPER: I'll stop laughing at this point.

15 THE COURT: No problem.

16 So if in fact it's cleaned up, does the Government
17 have any exhibit -- any objection to Plaintiff's Exhibit 19?

18 MR. CLUKEY: If there is some way he can get rid of
19 the highlighting, then no.

20 THE COURT: All right. So --

21 MR. CLUKEY: That's going to be a tough task.

22 MR. COOPER: Yeah. I mean --

23 THE COURT: Clean it up the best you can, and
24 then -- at least the marginalia, I don't know if -- I'm not
25 going to try to make him do the impossible and have a clean

1 copy. If you can't do the underlining, you can't do the
2 underlining, that's certainly not something -- the case is
3 not going to turn upon whether something is underlined
4 because nobody is going to mention it in court, okay?

5 MR. CLUKEY: Okay, Your Honor. This does come from
6 Mr. Nagy's files.

7 THE COURT: If he has a clean copy.

8 MR. COOPER: No, we gave you the best we've got.

9 THE COURT: I mean, but he doesn't keep a file copy,
10 or this is -- a file copy that wouldn't have any of this
11 stuff on it?

12 MR. COOPER: Um, not that I'm aware of, no, Your
13 Honor.

14 THE COURT: Well, ask him over the weekend. And if
15 he's got a file copy, that solves everybody's problem.

16 MR. CLUKEY: Actually, Your Honor, may I have a
17 clarification of your rulings? Is there a ruling that
18 anything that went from Mr. Nagy to the IRS, as well as to
19 the IRS back, that's relevant and that's admissible evidence?

20 THE COURT: Well, anything that he sent to the IRS,
21 if he wants to get it in, if he can, and he can authenticate
22 it, that's up to him.

23 MR. CLUKEY: I just meant in the spirit of your
24 Order.

25 THE COURT: Well, the Order says, um, the Motion is

1 granted as to evidence of the IRS Section 6700 administrative
2 investigation that was never communicated to Nagy or Debevo,
3 including conduct. Motion is denied to income tax, audit
4 evidence, unless either plaintiff can establish he
5 communicated to the IRS.

6 So I think this would be covered in that part of it
7 right there.

8 MR. CLUKEY: Right. I didn't understand based on --
9 that's what I thought.

10 THE COURT: Okay.

11 MR. CLUKEY: So we would have no objection to this
12 cleaned up, notwithstanding our original objection to the
13 whole category.

14 THE COURT: Okay. Yeah.

15 MR. CLUKEY: Thank you.

16 MR. COOPER: The next exhibit --

17 THE COURT: I guess it could come in if it weren't
18 in your file, too.

19 So, yeah?

20 MR. COOPER: Exhibit 20, the next exhibit, Your
21 Honor.

22 THE COURT: So number 19 will come into evidence
23 cleaned up, and you can use it in your opening statement if
24 you want to, that's where we are going.

25 MR. COOPER: That's what I'm asking Your Honor.

1 THE COURT: That's fine.

2 (Thereupon, Plaintiff's Exhibit Number 19 was
3 received in evidence.)

4 MR. COOPER: The next one is 20, Your Honor.

5 THE COURT: Okay.

6 MR. COOPER: And it's the same type of document.
7 It's a response that Mr. Nagy made to the international
8 examiner of the IRS. And the second version does have
9 highlighting. It is not as clean. We will remove that from
10 the binder to solve that.

11 THE COURT: Okay. So you are -- number 20, the
12 objection is, again, this should be a clean copy?

13 MR. CLUKEY: Yes, Your Honor.

14 THE COURT: So clean it up, um, and then you can use
15 it in your opening argument, okay?

16 (Thereupon, Plaintiff's Exhibit Number 20 was
17 received in evidence.)

18 MR. COOPER: The next exhibit, Your Honor, is 33.

19 THE COURT: All right.

20 MR. COOPER: Which is the no-change letter that the
21 IRS sent to Derivium.

22 THE COURT: Yes. Consistent with my ruling, that's
23 going to come into evidence over the Government's objection.

24 So 33 will be in evidence and you can use it in your
25 opening argument.

1 (Thereupon, Plaintiff's Exhibit Number 33 was
2 received in evidence.)

3 THE COURT: But you know, nobody gets to define the
4 no-change letter, what the no-change letter means except me,
5 not you, because you may not define it the same way I define
6 it, and that wouldn't be a good thing for the jury to
7 consider.

8 MR. COOPER: I'm sorry. I can't hear you.

9 THE COURT: You may not define it the same way I
10 define it and that would not be a good thing.

11 MR. COOPER: Hopefully, we get to discuss that.

12 THE COURT: Maybe in closing, but not in the
13 opening.

14 MR. COOPER: Yes, Your Honor.

15 THE COURT: Okay.

16 MR. COOPER: Exhibit 38 is the no change category.

17 THE COURT: Okay. Same thing.

18 (Thereupon, Plaintiff's Exhibit Number 38 was
19 received in evidence.)

20 MR. COOPER: Exhibit 39, I would like to use, and I
21 don't believe there is an objection to that.

22 THE COURT: Okay.

23 MR. COOPER: I would like to discuss --

24 THE COURT: 39 already in evidence, Gail?

25 MR. COOPER: Yes, Your Honor.

1 THE COURT: Okay. Good. No problem.

2 MR. COOPER: Exhibit 40.

3 THE COURT: Yeah.

4 MR. COOPER: This is a memorandum that Mr. Nagy
5 wrote about the tax treatment of the transaction if a
6 borrower defaulted. He gave advice that it would be a tax
7 rule. They have objected under relevance. We think it's tax
8 advice on the transaction.

9 THE COURT: Yes, sir.

10 MR. CLUKEY: We objected under 801, Your Honor.

11 MR. COOPER: Oh, I'm sorry. It's on his letterhead.

12 THE COURT: Ms. Weis, you have been overruled by Mr.
13 Clukey.

14 MR. COOPER: Maybe one at a time.

15 MS. WEIS: Your Honor, well, whether or not it's on
16 his letterhead, as you know under 801, any out-of-court
17 statement that's offered for the truth of the matter asserted
18 is hearsay. And because Mr. Nagy's offering it in support of
19 his case, it's certainly not a party admission. That's the
20 primary basis for our objection.

21 THE COURT: Okay. I'll overrule that objection.
22 I'll admit it into evidence if you want to use it.

23 MR. COOPER: Thank you, Your Honor.

24 (Thereupon, Plaintiff's Exhibit Number 40 was
25 received in evidence.)

1 MR. COOPER: And then the next, the same is also with
2 Exhibit 49, Your Honor.

3 MS. WEIS: Your Honor, with Exhibit 49, I think that
4 it's a little bit of a closer call if you are going to make
5 an 807 ruling, because it's getting into proper treatment of
6 lender hedge costs, which is a fairly, I would say complex
7 topic. It's getting into expert testimony.

8 And Mr. Nagy is offering for the truth of the matter
9 asserted how to treat lender hedging costs. It's basically
10 expert testimony at that point that he's offering through a
11 hearsay document.

12 MR. COOPER: The document goes to two things:

13 It's one, the client asks him to give him -- how do
14 you account for hedges? Certainly, that goes to his state of
15 mind if he believed there were hedges or not.

16 Second, it goes to him giving, again, what he
17 thought was his best tax advice.

18 MS. WEIS: Your Honor, with respect to whether or
19 not Mr. Nagy knew there were costs, first of all, prior
20 inconsistent statement. I don't think he can admit it
21 through that argument.

22 In addition, at this point in time, Mr. Nagy has
23 testified, although there might be some dispute about it, at
24 what point in time he knew that BVL had no hedging costs
25 reflected on any of its books. We have some question -- on

1 its U.S. books.

2 Therefore, the proper treatment of the hedging
3 costs, we don't understand why he would be writing this memo
4 if, in fact, it was written at the time with regard to a
5 topic that he knows is completely irrelevant. There are no
6 hedging costs reflected on the books.

7 MR. COOPER: That's -- he was told, and I think --
8 he's read the depositions, everyone was told there was
9 hedging going on on the lender's side. He was asked to write
10 a memo on it.

11 THE COURT: I've read the depositions. And that
12 part of the deposition is not coming into evidence, but
13 that's irrelevant. What someone told somebody about hedging,
14 if you look at my designations, is not coming into evidence,
15 it's hearsay.

16 Now, this one we'll do the old-fashioned way. I'm
17 not going to make a blanket ruling on this one until I
18 understand where we are, and Mr. Nagy gets on the stand or
19 somebody tries to put it in.

20 So you can't use it in your opening argument, but
21 you may be able to get it in.

22 MR. COOPER: And may I approach, Your Honor?

23 THE COURT: Sure.

24 MR. COOPER: The last one is a demonstrative
25 exhibit, which is 84.

1 THE COURT: 84?

2 MR. COOPER: 84.

3 This is simply a timeline of all the memoranda that
4 have been admitted into evidence. And I would like to use it
5 as a demonstrative during opening.

6 MS. WEIS: We don't have an objection as to it being
7 used as a demonstrative. We have an objection to it being
8 admitted into evidence. It's an improper summary under
9 Rule --

10 MR. COOPER: It's just the memos that are all in
11 evidence.

12 THE COURT: We don't know that yet. So you don't
13 have any objection to him using it as a demonstrative right
14 now; is that correct?

15 MS. WEIS: No, Your Honor.

16 THE COURT: Okay. That's what you want.

17 MR. COOPER: That's all I have. Thank you.

18 THE COURT: Okay. Great.

19 MR. CLUKEY: Your Honor, there is one more
20 demonstrative we were thinking about using during our
21 opening.

22 THE COURT: Okay.

23 MR. CLUKEY: We teed that up with Mr. Cooper, and I
24 can't remember where we left off with the foreign entity
25 chart that we showed you. I would just --

1 MR. COOPER: Okay. The foreign entity chart, it's
2 got all those foreign entities and these types of
3 communications, and you've withheld the relevancy objections
4 on some of those documents.

5 THE COURT: Okay.

6 MR. COOPER: We just ask that it not be shown in
7 front of them.

8 THE COURT: I guess looking at color, I don't know
9 who did the annotation of the deposition, but it was very
10 well done, and I appreciate it. It made my job a lot easier.

11 MR. CLUKEY: That was Ms. Weis, Your Honor.

12 THE COURT: Well, that's -- because, you know,
13 sometimes what I have is highlighted and handwritten notes.
14 So this is, you know, my ruling couldn't be any better, but
15 at least it makes it easy for me to make rulings.

16 And what's your objection, Mr. Cooper?

17 MR. COOPER: Just what entities are going to be
18 talked about and brought into evidence, and what's relevant.
19 We don't think it reflects what will come in. Obviously, I'm
20 going to be fighting over it.

21 THE COURT: All right. So as long as there is
22 demonstrative evidence, I'll allow you to use it in your
23 opening. It may not be true in closing, but it's not coming
24 into evidence until you admit it into evidence.

25 I think the jury is going to be -- I mean, there is

1 so many things going on in this case, I think it would help
2 the jury to understand the lay of the land. And some of the
3 things may not come true, and if they don't come true, you
4 can tell them it didn't come true at the end of the case,
5 because -- the same thing for your exhibits, you are going to
6 use demonstratives, some of those may not come in, either.
7 So I don't know, they may be. I haven't looked at all those,
8 so --

9 MR. COOPER: And Your Honor, I raised it earlier
10 today, if Mr. Debevc is still sitting at the table, is it
11 appropriate before the start of evidence for you to instruct
12 the jury to consider who is on what documents and what they
13 may or may not have known about it? Because a majority of
14 these documents are e-mails and correspondence that did not
15 come out of his files and he was not -- he was not -- he was
16 not part of the correspondence, and we would want that made
17 clear up front instead of trying to ask for forgiveness at
18 the end of the trial.

19 MR. CLUKEY: Your Honor, this is directly relevant
20 to our conspiracy requests that you are going to hear on
21 Monday.

22 THE COURT: Okay. All right. Now, I know we are
23 going to give a jury charge as to the one uncommon witness,
24 the one that's not common to everybody, so -- and I think
25 there may be something in the opening charge, and we may --

1 to the effect that there is some evidence that may be only
2 applicable to Mr. Nagy, there is some evidence that may be
3 only applicable to Mr. Debevc, and pay attention for that
4 reason, which when you take notes, which one is relevant to
5 which one, you will have to bring -- you know, we'll have to
6 bring that out on cross-examination.

7 MR. COOPER: No, I understand. But I would just --
8 coming from you, it's a little bit more powerful than me
9 crossing, so they have that in their mind when I'm crossing.

10 THE COURT: We'll try to make that. I think we'll
11 have two defendants, and we have a charge, we'll probably do
12 that, yeah. So there will be some general charge in the
13 opening.

14 MR. COOPER: And then I have a petition, plea, is
15 there any way that we could try to get some kind of ordering
16 of the witnesses?

17 THE COURT: Yeah.

18 MR. COOPER: Just for lifestyle reasons and
19 preparing?

20 THE COURT: So the night before or, you know, if you
21 can give them a lineup, each side, you give it to them.

22 MR. COOPER: I'll be more than happy to.

23 THE COURT: And tell them who you are going to be
24 calling the next day. I think that's a good idea for both
25 sides.

1 MR. CLUKEY: Yes.

2 MR. COOPER: It would just make -- thank you.

3 MS. WEIS: Along those lines, there is a couple --
4 at least one witness, Patrick Kelly, who appears on multiple
5 parties' witness list. Mr. Debevc has him listed, as well.

6 So that we are not calling people multiple times, I
7 wanted to just sort of raise with you and with Mr. Debevc, I
8 mean, should we expect, you know, tell the witnesses they
9 should expect to be called, you know, this week in our case
10 in chief, and then next week in their case in chief, or will
11 they be subject to cross and direct by both sides at the same
12 time?

13 THE COURT: Um, you know, I can't prevent a local
14 witness from being recalled, but perhaps at the end of the
15 testimony, if you can tell the witness whether they may be
16 subject to recall next week or not -- I mean, how -- how are
17 you going to do it? I mean, are you going to -- there is a
18 witness that's on the Government's list and your list, are
19 you going to try to get what you want out on
20 cross-examination or do you want to try to get it out on
21 direct examination next week?

22 MR. COOPER: I'm a big believer on doing things
23 once. So I will do my best to get it all out, except for the
24 one caveat to that is if they call Mr. Nagy, he would be
25 someone that I probably would call him.

1 THE COURT: Okay. I was going to -- I mean, I
2 guess --

3 MS. WEIS: We will be calling Mr. Nagy.

4 MR. CLUKEY: We will be calling Mr. Nagy and Mr.
5 Debevc at some point in our case in chief.

6 THE COURT: Okay. That's fine.

7 So then if, in fact, he calls Mr. Nagy and can't
8 cross-examine him anyway, because the Rules don't let you,
9 you just stand up and say, I have no questions at this time,
10 but I'm going to call Mr. Nagy in my case next week, or
11 something, to tell the jury why you didn't ask any questions,
12 but you can't do it twice.

13 MR. COOPER: Pardon?

14 THE COURT: You can't do it twice.

15 MR. COOPER: I can't? I thought we had this
16 conversation, cross him twice. I can't ask my own witness
17 questions?

18 THE COURT: Yeah. I mean, you can't -- you can't
19 fully put your case out in, quote/unquote, cross-examination
20 and then call him again next week, and say, do it again.

21 MR. COOPER: Oh, yes, Your Honor. I would not do
22 that.

23 THE COURT: You may want to ask the question,
24 clarifying questions, and then get the whole story the next
25 week.

1 But I mean -- I mean, you can't -- again, you can't
2 use -- you can't, quote/unquote, cross-examine your own
3 witness. I mean, you can ask him --

4 MR. COOPER: Direct questions.

5 THE COURT: Direct, you know, direct questions.
6 They get to cross-examine the witness on one of those Rules
7 of Evidence.

8 MR. COOPER: I forget so quickly.

9 THE COURT: All right. Yes, sir?

10 MR. CLUKEY: Nothing further.

11 THE COURT: Okay. Mr. Debevc, how about you, do you
12 want to say anything? Anything you want to bring to the
13 Court's attention? Any exhibits or anything like that?

14 MR. DEBEVC: I do have some exhibits, but I do have
15 a request, perhaps this would be an appropriate time to take
16 a break, so we can find out what kind of response we got?

17 MR. CLUKEY: I found out there won't be another
18 response today.

19 THE COURT: There won't be a response today? All
20 right. Not to be pejorative again, does that mean that there
21 won't be a response until 9:00 Monday morning at the
22 earliest?

23 MR. CLUKEY: We'll have a response to the Court by
24 9:00 Monday morning definitely.

25 THE COURT: Okay. But there is going to be some

1 consideration and some discussion over the weekend?

2 MR. CLUKEY: Yes, Your Honor.

3 THE COURT: I just didn't know whether --

4 MR. CLUKEY: Yes, sir.

5 THE COURT: And I know you are not 40-hour people,
6 but I just -- I don't know anybody in Washington -- sometimes
7 there may be somebody up there who is lucky to be a 40-hour a
8 week person.

9 Okay. All right. Mr. Debevc may or may not, so we
10 might as well handle what we can handle today.

11 MR. DEBEVC: Well, Your Honor, I think that up to
12 this point in time, I did present certain -- notified the
13 United States of the documents that I would like to present,
14 and that they objected to those, and I would like to discuss
15 that. I understand that -- I think that my e-mail today --

16 THE COURT: Let me -- and I'll be glad to do -- do
17 you think perhaps that since you go second, Mr. Debevc, and
18 perhaps that you may not be in the case as of Monday, it
19 would be more efficient, perhaps, to do this sometime next
20 week when you know that you are going to be in the case?

21 MR. DEBEVC: Um, I would actually prefer that.

22 THE COURT: Okay. All right. Then I won't make you
23 do something you don't want to prefer at this time, okay?

24 MR. DEBEVC: Thank you. I appreciate that, your
25 consideration.

1 THE COURT: Okay. That's no problem.

2 MR. CLUKEY: I guess for clarification, if there are
3 any exhibits that Mr. Debevc planned to use in his opening --

4 THE COURT: Right.

5 MR. CLUKEY: -- it might make sense to cover those.
6 We were just handed, for example, a document that was
7 hearsay.

8 THE COURT: Okay.

9 MR. CLUKEY: And a settlement offer we were handed.
10 So I just want to make sure that Mr. Debevc doesn't want to
11 use those in his opening.

12 THE COURT: Is there any documents that you are
13 planning on using in your opening statement Monday that --

14 MR. DEBEVC: I think in terms of the documents, um,
15 no, because I think I just want to paint the picture to the
16 jury, and then the documents will come out as trial
17 progresses, if that happens.

18 THE COURT: Okay. All right. If, in preparing for
19 the case -- you get together Monday morning at 9:00 -- if in
20 fact you think of something over the weekend, please let the
21 Government know and let us know, and then we can try to
22 handle that Monday morning first thing, okay?

23 MR. DEBEVC: If I find that in my thinking over the
24 weekend in preparing the opening statement that I do need to
25 include the document, I will have the information for

1 Mr. Clukey and I can make him aware of that.

2 THE COURT: Okay. Good. Thank you very much.

3 So anything else before y'all go and ruin your
4 weekends? Nope.

5 All right. Have as good a weekend as you can, and
6 we will see you at 9:00 Monday morning. And Gail, bring the
7 jury in at 10:00 Monday morning. We'll bring them in at 10,
8 because it takes a while for them to find out the parking
9 places and things like that, but we'll start at 9:30 the rest
10 of the time, okay?

11 All right. Thank you very much.

12 (Thereupon, the Court was in recess.)

13 *****

14 I certify that the foregoing is a correct transcript from the
15 record of proceedings in the above-titled matter.
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22 Amy C. Diaz, RPR, CRR

February 22, 2011

23 S/ Amy Diaz
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1	Government's Exhibit Numbers 48, 210, 212, 335,	8
2	193, 194, 207, 204, 223 and 42	
3	Plaintiff's Exhibit Numbers 39, 41, 42, 43, 44,	9
4	45, 46, 47, 48 and 51	
5	Plaintiff Debevc's Exhibit Numbers 19 and 25	10
6	Government Exhibit Number 45	22
7	Government Exhibit Numbers 334, 344, 80, 248, 9,	37
8	27, 219, 218 150, 26, 57, 216, 336, 220, 183,	
9	228, 230, 147, 261 342 and 94 A B and C	
10	Government Exhibit Number 189	43
11	Government Exhibit Number 58	47
12	Government Exhibit Number 200	52
13	Plaintiff's Exhibit Number 19	65
14	Plaintiff's Exhibit Number 20	65
15	Plaintiff's Exhibit Number 33	66
16	Plaintiff's Exhibit Number 38	66
17	Plaintiff's Exhibit Number 40	67
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